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Citation

Frank I. Michelman, IDA's Way: Constructing the Respect-Worthy Governmental System, 72 Fordham L. Rev. 345 (2003).

Published Version

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2003

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Recommended Citation

Frank I. Michelman, *IDA's Way: Constructing the Respect-Worthy Governmental System*, 72 Fordham L. Rev. 345 (2003).
Available at: <http://ir.lawnet.fordham.edu/flr/vol72/iss2/7>

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THE INTEGRITY OF LAW

IDA'S WAY: CONSTRUCTING THE RESPECT-WORTHY GOVERNMENTAL SYSTEM

*Frank I. Michelman**

This is for Dean John Feerick. It is about him, too, in a way, although it may not appear to be. It is about character, civility, and good will. It is about what is required of a group of people, and their leaders, who find themselves, for very good and strong reasons, in a certain situation of the greatest interest to political thought: determined to stick together, but to do so in ways and under conditions that all know will require each to submit himself or herself to an endless series of binding, collective decisions, affecting matters dear to the hearts of many or of all, about which they expect to be divided by profound, intractable disagreements.

I am not presuming to suggest that such has recently been the case of the Fordham University School of Law or its faculty. (Who would I be to know?) It can, of course, be thus with faculties; but faculties—much as I cherish them—are not my main concern in what follows. Rather, I have in mind the situation of members of a modern political society, seen as a great deal of contemporary political philosophy has been inclined to see it. Liberal theory lately has given a lot of attention to the existence of such disagreement as I have mentioned, and to the question of how, in view of “this fact of pluralism,” the coercion implicit in any possible practice of legal ordering, or government by law, can possibly be morally appropriate.¹

I. “INTEGRITY” IN A NEW KEY

A. Goods of Union

Suppose you believed all of the following—never mind right now why you might; we’ll get to that.² First: A law (a legal rule, principle,

* Robert Walmsley University Professor, Harvard University. I am indebted to Jeremy Waldron for a crucial suggestion.

1. See, e.g., John Rawls, *Political Liberalism* 36-37 (1996) (positing “general facts” of “reasonable pluralism” and of “oppression”); *id.* at 217 (proposing a “liberal principle of legitimacy”).

2. See *infra* Part II.

or norm) can be validly "in force" in a country regardless of whether that law is witless, vicious, unjust, or all of the above. (So it does not seem to you, as it did to St. Augustine, that an unjust law is "no law at all."³) Second, in some countries—though not all—governments are morally justified in demanding *everyone's* compliance with all the laws that the judges in that country treat as validly in force, regardless of the moral and other merits and demerits of any given law. Third, inhabitants of such countries can be morally justified in collaborating with the government's efforts to secure such compliance, using coercive means if necessary, regardless of any adverse convictions that they, themselves, may hold regarding the merits of any law. Fourth, it is very much in the moral and other interests of everyone in a given country that the second and third propositions in this series should hold true there. Countries in which those two propositions do hold true are morally and otherwise well-ordered in a way that other countries are not.

Here, in a nutshell, is why: Only where the propositions do hold true (so runs the set of beliefs we are positing) can inhabitants partake of certain great "goods of the political"⁴ or—as I sometimes shall call them—goods of "union." This result is owing, in part, to what John Rawls, himself approving it, called "Hobbes' thesis."⁵ Without the government's known and proven readiness to step in as necessary to make sure that everyone plays by the rules, the country's practice of legal ordering, or government by law, by which the goods of union are produced, could not be expected to hold together. On the other hand, though, it will not serve our moral interests to have those goods of union produced by morally reprehensible means. In order, then, for our moral interests to be served, it would have to be the case that the second and third propositions in this series hold true.

Fifth, whether those two propositions (the second and third of the series) hold true in any given country depends on the general system of government and lawmaking in place in that country. They do if, and only if, that country's general system of government is in certain crucial respects reliable or, as I shall say, "respect-worthy." It follows, if the fourth proposition in the series has been accepted, that everyone has a very strong reason for wishing the system of government in his or her country to be, in the relevant sense, respect-worthy.

Summarizing in reverse, the set of beliefs we are positing comes to this: On condition that a country's system of government is respect-

3. See St. Thomas Aquinas, *The Summa Theologica*, Part One of the Second Part, Question 95: Of Human Law, Second Article, Objection 4, *reprinted in* George C. Christie & Patrick H. Martin, *Jurisprudence: Text and Readings on the Philosophy of Law* 166 (2d ed. 1995) (reporting and endorsing St. Augustine's remark).

4. See Rawls, *supra* note 1, at 139, 157 (discussing "the very great public good" of the political).

5. *Id.* at 211.

worthy (in a certain sense still to be developed), inhabitants are morally justified in collaborating in universal networks of compulsion to comply with all the legal products of that system. Being thus justified is very much in the moral interest of the inhabitants, because only on the condition of (more or less) everyone's guaranteed compliance (most of the time) with all of the laws can inhabitants secure to themselves and their fellows a package of very great moral goods of political union, through their practice of legal ordering or government by law.

Of course, you don't have to believe any of it. But suppose you did.

B. *The "Governmental Totality"*

Suppose you believe it all. In order, then, to tell whether you have the valued moral warrant for collaboration in your country's networks of legal compulsion, you will have to pass judgment on the respect-worthiness of your country's general system of government currently in place. In order to do that, you must be able to see and to say what that system is. How, then, will you go about constructing your image of what "the system" is?

At this point, I am going to suggest one possible way of doing it. Possible alternatives will appear later.⁶ You could start with the obvious idea that the "system" or "practice" of government whose respect-worthiness you want to gauge consists of the entire aggregate of concrete political and legal institutions, practices, laws, and legal interpretations currently in force or occurrent in the country. Call this "the governmental totality." It would be, in effect, the currently surviving deposit of the country's entire history to date of institutional and legal creation and revision. Notice that, if your country happens to be one that relies substantially on judicial rulings to steer or constrain decisions on matters of substance—such as the permissibility of abortion, the use of affirmative action measures, the implementation of the death penalty, the legal regulation of the flow of money in politics, the use of the public budget to provide direct support for sectarian religious education, the obligations of the government to provide positively for people's basic civic needs, interests, and opportunities, etc.—then (but only then) the current governmental totality will be composed, in significant part, of major, extant judicial rulings on such matters.

Looking out at this governmental totality, one might ask oneself how various classes or groups of persons are faring, and maybe how they would perceive matters from their own situations and standpoints. One would apply whatever standards of freedom, justice, prosperity, distribution, participation, and systemic openness to change one considers to be applicable. Finally, one would judge

6. See *infra* Part III.

whether the total performance is good enough, on the whole, to be accepted considering the practical, imaginable alternatives. If one judged that it would be, say, foolhardy to answer this question with a "no," then, keeping Hobbes' thesis in mind, one might judge the governmental totality to be respect-worthy. Consequently, everyone would be justified in collaborating in the country's networks of inducement and, where needed, compulsion, of universal compliance with every law that issues from the system.

C. "*Integration*" ("*Rational Reconstruction*")⁷

It seems that a person attempting to gauge the respect-worthiness of her country's extant system of government in this total-performance way will have to proceed in a manner rather like that of Ronald Dworkin's legendary Judge Hercules.⁸ To keep this non-official personage distinct from Hercules the judge, I'll call her Ida. On any given occasion, Ida, like Hercules, is aiming to make a judgment. Perhaps in the wake of some repellent governmental action or legal outcome from the system of government in place in her country, Ida feels called upon to say whether that system continues to be one that she judges respect-worthy—worth preserving—even at the cost of supporting enforcement of bad and wrong laws issuing from it. Such a judgment, regarding the moral merit of the system, requires that Ida have in view a more refined specification of what the system is than she can get from just staring at the total, aggregate mass of raw, undigested, political and legal data found in the national annals and archives. Ida will have to connect the dots into normative patterns and principles. She will have to extrapolate some major, implicit normative leanings and trend-lines. She will have to make some kind of start, at least, toward cooking the raw data into an incipient, normative political theory.

It thus appears that Ida's problem resembles Hercules'. Like him, she must refine her country's raw, historical record of lawmaking and related events into a more or less clear picture of what she then (having produced the picture) will consider the country's central, defining, political-moral commitments. It is those defining commitments, thus depicted, that will compose the "system" that Ida will find to be, or not to be, sufficiently worth preserving to warrant support of every law that issues from it (in view of Hobbes' thesis),

7. See, e.g., Jürgen Habermas, *Between Facts and Norms* 59 (W. Rehg trans., 1996) (using the term "rational reconstruction" to signify an "articulation" of "the normative substance of the most trustworthy intuitions of our everyday political practice, as well as the substance of the best traditions of our political culture"); *id.* at 197, 211, 222 (using the same term to describe Ronald Dworkin's account of adjudicative work).

8. See Ronald Dworkin, *Hard Cases, in Taking Rights Seriously* 81, 105-30 (1977); see also Ronald Dworkin, *Law's Empire passim* (1986).

regardless of moral or other faults in any of those laws taken on their own. It seems that the only way by which Ida can hope to draw such a systemic picture, from what starts out as a byte-by-byte record of the country's legal and governmental history, is the one Hercules uses: Treat the record as if it were made by an acting subject that has, or has been developing, a consistent set of political-moral intentions, as a person of integrity would.

Nor does the parallel with Hercules, J., end there. Just as Hercules is destined to do, so is Ida bound to sense or perceive more than one plausible construction of the performance history to date. These could include at least one construction she regards as projecting a governmental practice that is respect-worthy or worth preserving and at least one she does not. Perhaps Ida, like Hercules, will operate on the premise that the "correct" construction is the one that reflects what she finds to be the most morally redemptive set of basic principles that "fits" the data about as well as any morally inferior competing construction does. If so, then she, like Hercules, will be brushing aside a certain fraction of inimical judicial rulings and other pieces of the totality as "mistakes" that she, optimistically, allows herself to expect will give way to correction, if not tomorrow then in the not-too-distant future.

For an especially clear and dramatic illustration, consider an American Ida in 1857, newly confronted with the Supreme Court's decision in *Dred Scott v. Sandford*.⁹ In that case, the Court declared its view that "the right of property in a slave is distinctly and expressly affirmed in the Constitution."¹⁰ It held that slavery, therefore, could not be prevented by federal law from spreading into the pre-statehood territories of the United States without contravening the Fifth Amendment's guarantee against deprivations of property without due process of law.¹¹ Coming in the wake of earlier, ostensibly pro-slavery decisions,¹² the *Dred Scott* ruling struck many free-soil advocates (or so they claimed) as reflecting a construction of the American Union that foretold future Supreme Court rulings protecting slave-holding against exclusion or suppression by state law, even in the historically

9. 60 U.S. (19 How.) 393 (1857).

10. *Id.* at 451.

11. *See id.* at 449-50.

12. *See Strader v. Graham*, 51 U.S. (10 How.) 82 (1850) (holding that states are free without federal supervision to fashion their own laws for determining the slave or free status of any person); *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 611, 612-13 (1842) (holding state laws unconstitutional—as violations of a power vested exclusively in Congress to regulate in the matter of fugitive slaves—insofar as they might "interrupt[], limit[], delay[], or postpone[] the right of an the owner to the immediate possession of a the slave," and describing the Constitution's fugitive slave clause as a guarantee of security of property so vital to Southern "interests and institutions" that it must be deemed "a fundamental article, without the adoption of which the Union could not have been formed").

"free" states.¹³ If our Ida had shared that apprehension, and if she had considered slavery to be a moral evil great enough to outweigh the moral and other goods of union, she might have decided, as many Garrisonians claimed they did, that this Union was not worth saving and hence not deserving of her continued collaboration.¹⁴

That would not have been, however, the only path open to her thinking. Alternatively, our Ida could have believed sincerely that the Supreme Court had misconstrued the American Union as one that affirmatively condones the institution of slavery and contemplates its perpetuity in the United States. Along with Frederick Douglass and Abraham Lincoln, she could have believed that the Union, on a true construction, was one that temporized with slavery, to be sure, for the sake of union-creation, but that also was from the beginning designed by its framers to set slavery "in the course of ultimate extinction."¹⁵ So believing, Ida could have concluded honorably that the Union, partly for that very reason, was worth preserving.¹⁶ She, then, would have followed Lincoln in treating the *Dred Scott* decision as a "mistake," a presumably barren and doomed judicial act that did not, as such, reflect much on the respect-worthiness of the true American system of government; and thus was not to be granted any "gravitational" effect on other cases claimed to fall within its normative neighborhood,¹⁷ although also was—and this would be Ida's bow to Hobbes' thesis—not to be denied validity as an act of government demanding to be heeded as such. Ida, then, would have counseled against any direct

13. See, e.g., Abraham Lincoln, A House Divided: Speech at Springfield, Illinois (June 16, 1858), in 2 Collected Works of Abraham Lincoln 461, 464-65 (Roy P. Basler ed., 1953); Abraham Lincoln, First Debate with Stephen A. Douglas at Ottawa, Illinois, (Aug. 21, 1858), in 3 Collected Works of Abraham Lincoln, *supra*, at 27. It is not fully clear exactly how the Supreme Court was expected to hinge such a ruling to the constitutional text. The Fifth Amendment itself had no application to state lawmaking. See *Barron v. Baltimore*, 32 U.S. 247 (1833). It seems the likeliest textual hook would have been the Article IV, Section 2, Privileges and Immunities Clause of the U.S. Constitution. See, e.g., *Lemmon v. People*, 20 N.Y. 562 (1860), where the New York court rejected a plausible-looking claim to the effect that New York could not, consistently with this clause, strip a slave-owner of his slave property by applying its law of personal freedom to slaves being shipped through the port of New York from one slave jurisdiction to another.

14. See Eric Foner, *Free Soil, Free Labor, Free Men: The Ideology of the Republican Party Before the Civil War* 137-38 (1995). William Lloyd Garrison famously called the "compact . . . between the North and the South" a "covenant with death and an agreement with hell." Resolution Adopted by the Antislavery Society, Jan. 27, 1843, *quoted in* Walter M. Merrill, *Against Wind and Tide: A Biography of Wm. Lloyd Garrison* 205 (1963).

15. E.g., Abraham Lincoln, Reply at the Debate in Jonesboro, Illinois (Sept. 15, 1857), in 3 Collected Works of Abraham Lincoln 117 (Roy P. Basler ed., 1953); see also Frederick Douglass, *The Constitution of the United States: Is It Pro-Slavery or Anti-Slavery?*, in 2 Life and Writings of Frederick Douglass 467 (Philip S. Foner ed., 1950).

16. But see Frederick Douglass, *Autobiographies* 704-05 (1994).

17. Dworkin, *Hard Cases*, *supra* note 8, at 111.

interference with the specific civil relationship decreed by the Court to subsist between Dred Scott and John Sanford.¹⁸

Having noticed how Ida's intellectual problem resembles that of Hercules, J., we ought also to notice how her role and situation differ from his. Unlike Hercules, Ida is not a public official responsible for specific exercises of power over other individuals and the affairs that concern them. If Herc₁ and Herc₂, each sitting as a judge in his own court, disagree over the true construction of the system at the same moment in time—or if, ostensibly agreeing on the true construction, they nevertheless disagree over what it requires in identical cases pending before them—there is an apparent problem of justice. The fates of the litigants then hang on which judge's court they happen to land in. Of course, there is an appeals system designed, in part, to handle this sort of problem. Yet if both cases travel up the appellate pyramid, the outcomes then will hinge on a nose-count among three, seven, or nine SuperHerCs whose several internal moral vectors may happen to diverge in respects material to this particular case. Whether these quirks present a serious moral problem is not a question on which we need to dwell; they have no application to our heroines. No doubt, various Idas may arrive at various reconstructions of the governmental system in place, owing to differences in their internal moral compasses.¹⁹ That effect, however, can pose no direct problem of justice to parties because no Ida directly exercises any power over any party. Whether the effect poses some other sort of political-moral problem is a question better left until later.

II. LIBERAL LEGITIMACY: A BRIEF GENEALOGY²⁰

A. *Liberalism and the Pull to Consensus*

I want now to expand on the reasons why anyone actually might

18. Ida would still be tracking Lincoln. See Abraham Lincoln, Speech at Springfield, Illinois (June 26, 1857), in 2 Collected Works of Abraham Lincoln 400-03 (Roy P. Basler ed., 1953); cf. Abraham Lincoln, Address Before the Young Men's Lyceum of Springfield, Illinois (Jan. 27, 1838), in 1 Collected Works of Abraham Lincoln, *supra*, at 112-13.

19. See *infra* Part III.C.

20. Part II of this Article deals in abbreviated form with matters I have discussed in several other recent writings and draws substantially from them. See Frank I. Michelman, *The Problem of Constitutional Interpretive Disagreement*, in Habermas and Pragmatism (Mitchell Aboulafia et al. eds., 2002); Frank I. Michelman, *Constitutional Legitimation For Political Acts*, 66 Mod. L. Rev. 1 (2003); Frank I. Michelman, *Is the Constitution a Contract For Legitimacy?*, 8 Rev. of Const. Stud. (forthcoming 2003); Frank I. Michelman, *Living With Judicial Supremacy*, 38 Wake Forest L. Rev. 579 (2003); Frank I. Michelman, *Postmodernism, Proceduralism, and Constitutional Justice: A Comment on van der Walt and Botha*, 9 Constellations 246 (2002); Frank I. Michelman, *Relative Constraint and Public Reason: What is "The Work We Expect of Law"?*, 67 Brook. L. Rev. 963 (2002).

believe the series of five propositions with which we launched this reflection.²¹ And I want to do so by putting a "political liberal" spin on the series of beliefs.

"Liberals," as I use the term, are those of us who insist on the recognition by persons of each other as "free and equal."²² We insist on acceptance of the equal claim of each person to the pursuit of a life in accord with aims and ideals she adopts for herself, and on respect for each person's capacity for such a pursuit.²³ Liberals, accordingly, are committed to a sympathetic regard for the wide and deep diversity of ethical outlooks, situations, and interests among inhabitants of a modern country. Understanding that this ethical diversity gives rise to frequent, sincere, and intractable disagreements over what the laws for a society of notionally free and equal persons ought in all reason and justice to provide, liberals share a sense of moral obligation to take political disagreement seriously, respect it, and try to work around it.

"Political" liberals of this kind—I use John Rawls' name for us—shy away from coercion, of ourselves or of others. We want to feel that we always, when called upon, can give to others "public" reasons sufficient to justify the actual processes and practices of legal coercion in which we connive. Very roughly, public reasons are reasons that the giver sincerely believes ought to count as such for any right-minded (a/k/a "reasonable") political associate.²⁴ In other words, political liberalism is, itself, a kind of fighting faith. For better or for worse, political liberals feel morally justified in restricting the circle of those to whom we feel bound to justify our practice of political coercion to those who are "reasonable" like us. But what is "reasonable?"

B. *Legal Ordering and "Hobbes' Thesis"*

I assume most readers take for granted that the possibility of legal ordering—or call it government by law—is a very good thing, morally. A social practice of government by law, we feel certain—at least assuming it is popularly based and is otherwise "decent"²⁵—can carry inestimable benefits, for everyone affected, of social pacification, cooperation, coordination, and justice. The taken-for-granted supposition, to be clear, is not that any current governmental or legal order cannot stand vast improvement from the standpoints of justice, morality, and efficiency. Much more modestly, it is that our current

21. See *supra* Part I.A.

22. E.g., Rawls, *supra* note 1, at 19, 217.

23. Liberal individualism of this stripe is not to be confused with "atomism." See, e.g., Frank I. Michelman, *Brennan and Democracy* 65-67 (1999).

24. See generally John Rawls, *The Idea of Public Reason Revisited*, in John Rawls: *Collected Papers* 573 (Samuel Freeman ed., 1999).

25. See John Rawls, *The Law of Peoples* 62-68 (1999).

governmental order, and others relevantly resembling it, bring to everyone involved those mentioned, inestimable goods of the political,²⁶ when the baseline for comparison is a world without government by law. We are all, to that extent, the children of Thomas Hobbes and—as Jeremy Waldron would want me to add—Immanuel Kant.²⁷

We easily think of these great goods of the political as moral goods, on the understanding that everyone shares in the increase to them that results from any decent practice of government by law.²⁸ This expected flow of universal benefit can provide a strong, moral motivation for the support of such practices. It also offers moral justification for mobilization of social pressure and public force as required to ensure compliance by all with each and every law that issues from a currently established governmental system.²⁹

The reason why lies, of course, in “Hobbes’ thesis.”³⁰ The thesis starts from a sense that no practice of government by law can succeed in delivering its vaunted moral goods without the persistence in society of widespread inclinations to comply voluntarily with the laws (and legal interpretations) that issue from the practice.³¹ Next comes a belief that such inclinations cannot persist without an experientially justified expectation on the part of each participant that the others—most of them, most of the time—will play by the rules; that is, they will more or less abide by all the laws that issue from the specific regime of legal government that currently is established in the country, not picking and choosing which ones they’ll respect and which they’ll trash. We lack confidence that such expectations can hold up without visible guarantees of institutional backup. We fear the system will unravel without support from a credible prospect of socially organized compulsion waiting in the wings for cases of willful non-compliance.³²

All of this probably will make good sense to most readers. But consider, then, the consequence when you add to the picture the kind of deep, intractable, normative disagreement that recent liberal theory

26. See *supra* note 4 and accompanying text.

27. See Jeremy Waldron, *The Dignity of Legislation* 36-62 (1999); Immanuel Kant, *The Metaphysical Elements of Justice* § 42 (John Ladd trans., 1999); Thomas Hobbes, *Leviathan* chs. 13-17 (M. Oakeshott ed., 1962) (1651).

28. It would be going too far to suggest that *any* world in which government by law prevails must be better for everyone in it, or rank higher on the scale of what is right and fair, than might any realistically conceivable world from which this condition is absent. We do mostly take for granted, though, that the claim holds true of many historical and contemporary instances of the genus, including our own today.

29. We can leave room for contained occasions of civil disobedience and conscientious refusal without much disturbing the argument. See generally John Rawls, *A Theory of Justice* 319-43 (rev. ed. 1999).

30. See *supra* note 5.

31. See, e.g., H.L.A. Hart, *The Concept of Law* 191 (2d ed. 1994).

32. See, e.g., Habermas, *supra* note 7, at 8, 28, 198 (1996).

posits as endemic in modern political societies. To speak, as John Rawls does, of a plurality of clashing "comprehensive" ethical and metaphysical "views" is not quite fully to describe our predicament. Owing in part to what Rawls calls "burdens of judgment,"³³ our reasonable clashes of "view" extend to any number of major and morally fraught public policy choices that have to be resolved in one and only one way for everyone—e.g., under what, if any, conditions may or shall the state punish abortion, or compel taxpayer support of religious schools?³⁴ The consequence, then, of our attachments to government by law and to Hobbes' thesis is that we all become collaborators in webs of social practices that exert coercion and pressure upon persons to uphold and comply with laws that they know in their hearts to be bad, wrong, and unjust.

Do not doubt it. Day in, day out, by countless large and small acts of compliance and collaboration with our country's governmental regime, we, with little compunction, involve ourselves in a social mobilization of pressure and force against persons to comply with sundry laws and other legal acts with which they do not agree. And not only acts with which they do not agree, but acts that they confidently judge to be quite bad and wrong, and from what they sincerely and credibly take to be a public and not just a selfish point of view. Since judgments of the public merits of legal acts rarely will be unanimous, and disagreements about this often will be not only intractable and sharp but also honest and reasonable on all sides—or so we liberals insist—we may as well say that the benign and urgent aims of government by law require our willingness to join in subjecting others (not to mention ourselves) to pressures and compulsions to abide by legal acts that, so far as they (or we) honestly can tell, simply are wrong, are destructive or unjust, objectively and not just according to their (or our) own personal assessments.³⁵ Liberals cannot find this a comfortable state of affairs.

33. "Burdens of judgment" encompass sundry causes of obdurate disagreement about justice among reasonable persons who observe and report honestly, argue cogently, and share "a desire to honor fair terms of cooperation." Rawls, *supra* note 1, at 54-58. Among these causes Rawls lists the likelihood that

the way we assess evidence and weigh moral and political values is shaped by our total experience, our whole course of life up to now; and our total experiences must always differ. Thus, in a modern society with its numerous offices and positions, its various divisions of labor, its many social groups and their ethnic variety, citizens' total experiences are disparate enough for their judgments to diverge, at least to some degree, on many if not most cases of any significant complexity.

Id. at 56-57.

34. Compare *id.* at 36-37 (describing a "reasonable pluralism" of comprehensive ethical and philosophical views) with Jeremy Waldron, *Law and Disagreement* 105-06, 112-13, 152, 158-59 (1999) (pointing out the inevitable resulting persistence of reasonable disagreement over the demands of justice regarding matters of public policy, including at the constitutional level).

35. Note that the claim here is not that there are no right answers to questions of

C. *The "Reasonable"*

We are now in a position to say a little more, at least, about the circle of "reasonable" political associates to whom political liberals feel bound to justify their collaboration in legal coercion, in terms that will count as "public" within that circle.³⁶ Suppose everyone felt perfectly free to refuse compliance with any law reflecting or supporting a public policy that deviates sharply from the dictates of his or her own moral convictions. Alternatively, suppose we took it as granted that each political associate, as "free and equal," has a morally justified complaint against the state's general demand for compliance with any law that so deviates. In the first instance, assuming the correctness of Hobbes' thesis, no practice of government by law could be sustained at all in an ethically diverse society. In the second instance, none could justifiably be sustained among an ethically diverse population of persons who also are liberally committed to recognize and respect one another as free and equal. In either instance, the very great goods of the political would be unattainable in any liberal society where the fact of reasonable pluralism obtained. "Reasonable" political associates, it may now be said, are limited to those who are moved by these perceptions of impossibility to reject the assumption that anyone is free to refuse compliance with laws that don't conform to the dictates of his or her considered moral convictions, and that anyone has a justified complaint against state enforcement of any law that does not so conform. "Reasonable" associates include only those who share the same resulting liberal spirit of reciprocity and forbearance that motivates "us." John Rawls calls it "civility."³⁷

D. *"Proceduralism"*

Even within the circle of the reasonable thus defined, we must expect protracted and contentious disagreements over major, morally fraught issues of public policy. If only owing to burdens of judgment,³⁸ reasonable people in ethically diverse societies disagree sharply, deeply, and obdurately over the moral and other practical merits of policies regarding such matters as affirmative action, abortion, school vouchers, public religious exercises, restriction of money in politics, and the death penalty, to name a few. Is political liberalism, then, a project beyond reach?

political justice and prudence. The problem is that there are no publicly established answers to many of these questions, and aren't likely to be, in real political time, as long as "reasonable pluralism" is true of our countries.

36. See *supra* Part II.A.

37. Rawls, *supra* note 24, at 576.

38. See *supra* notes 33-34.

Enter the "procedural" turn in contemporary liberal theories of political justification. John Rawls provides a leading example in his proposed "liberal principle of legitimacy." "[O]ur exercise of [coercive] political power," that principle runs, "is proper and hence justifiable only when it is exercised in accordance with a constitution the essentials of which all citizens may reasonably be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational."³⁹

For Rawls, the category of "constitutional essentials" includes guarantees regarding the substance of the law, not just the institutional and procedural protocols for making it.⁴⁰ In what sense, then, can it be said that Rawls proposes a "procedural" test for political justification? "Procedural," in this context, does not mean a test concerned only with matters of lawmaking process as distinguished from the content of the legal product. It rather means a test that is abstracted or deflected from issues of morality and public policy that are obdurately and divisively controversial in society.

People who can't just go their separate ways, or don't want to, and who also can't agree on what really ought to be done by or for all of them together, may sometimes be able to find agreement on a method for settling what actually is to be done next. If several friends find themselves quarreling over which movie to see tonight but are determined to stick together in any case, maybe they can agree to "bracket" their quarrel by a coin flip. If members of society find they can't, in real political time, agree on the morality or utility of a government-dictated wages policy, maybe they still can agree to let the matter be resolved from time to time by laws made according to the rules laid down in a constitution. Their agreed practice for pro tempore legal settlement then is the "procedure," and the on-going, unresolved, bracketed disagreement of morality or policy is the "substance." Proceduralism thus implies a resort to what we may, with apologies to Rawls, call a "method of avoidance."⁴¹

As should now be clear, some matters that undoubtedly would be classed as "substantive" in other contexts play a "proceduralizing" role in Rawls' liberal principle of legitimacy. The thought is that reasonable people can all agree to the moral authority of a certain constitutional system for resolving all the (other) politically decidable

39. Rawls, *supra* note 1, at 217.

40. See *id.* at 227 (including among "constitutional essentials" the "equal basic rights and liberties of citizenship that legislative majorities are to respect: such as the right to vote and to participate in politics, liberty of conscience, freedom of thought and of association, as well as the protections of the rule of law").

41. John Rawls, *Justice as Fairness: Political not Metaphysical*, in Rawls: *Collected Papers* 388, 395 (Samuel Freeman ed., 1999) ("The hope is that . . . this method of avoidance . . . may enable us to conceive how, given a desire for free and uncoerced agreement, a public understanding could arise consistent with the historical conditions and constraints of our social world.").

questions that might come before the country from time to time, but only if that system includes guarantees against infringement of certain interests or rights that undoubtedly are substantive in ordinary thought: freedom from enslavement, for example, or freedom of thought and conscience, or an aptly qualified right to hold property.⁴²

In other words, a constitutional bill of "substantive" rights can be understood as the product of a "proceduralist" impulse to deflect attention from those politically decidable questions on which members of society cannot reasonably be expected or called upon to agree to a set of more abstract rules and principles defining a general political system for producing pro tempore institutional settlements of contested issues of public policy. On this set of rules and principles (or political system), all reasonable participants should find they have sufficient reason to agree. To put the idea a bit crudely: Reasonable people, aware of those inestimable benefits of government by law we keep harping on, and sharing a belief in Hobbes' thesis, can agree to take their chances on a recognizably democratic governmental system whose performance is guaranteed to stay within the constraints of a good, liberal, constitutional bill of rights.

If so, then it seems it should be possible to sustain a practice of government by law among an ethically diverse society of free and equal, reasonable and rational persons—including insistence, if that be thought necessary, on conformance by everyone to all the laws that issue from the system. All one needs is the right kind of constitution, one suited to the work that the legitimation project—so to name it—calls for. If the constitution is one that no reasonable person can reject as unworthy of the kind of respect that the project calls for, and if unconstitutional laws are more or less guaranteed to get sooner or later knocked out, then (it follows trivially) no reasonable person can complain about the state's demand for everyone's support of all the laws that make it through the constitutional-legal screen.

E. "*Legitimacy*"

And so we reach the notion of a "legitimate" law. A legitimate law is not necessarily a commendable one, nor even necessarily one that is consonant with justice. A law is legitimate, in your eyes, if you believe the state is, so to speak, within its rights in enforcing that law against you and everyone—regardless of whether you also believe that law, taken on its own merits, to be quite awful. Such a notion, obviously, will be at home only in the mind of a person who, being reasonable (in our special sense of the term),⁴³ is able to see how the state can be acting in a morally proper way when it seeks to enforce, against all alike, all the laws that issue duly from the governmental system

42. See Rawls, *supra* note 1, at 291, 298.

43. See *supra* Part II.C.

currently in force, notwithstanding the undoubted fact that always among those laws will be some that some inhabitants, sincerely and very possibly correctly, condemn as bad and wrong. The core of a "legitimacy" plea thus consists of two propositions: first, that our country's total, extant system of government by law is morally worth preserving (and here we would always implicitly be adding, considering the realistically available alternatives); and, second ("Hobbes' thesis"), that preserving it requires recognition all-round that the state is, so to speak, within its rights enforcing every law that issues from the system, including even some very bad and immoral ones.

Such a notion of legal legitimacy, if it can be sustained, plainly is one of very high moral import. The point of it, after all, is to justify morally what otherwise would appear to be unjustifiable to any liberal; that is, participation in compulsion against others to abide by laws that they know, as may we, to be bad and wrong.

III. SOME VARIATIONS ON SYSTEM CONSTRUCTION

A. *The System as Majority Rule*

Suppose you accept all that has preceded. Belief in the great goods of government by law, along with Hobbes' thesis, provides the major premise for what we may call a legitimation project, meaning a possible justification of collaboration in the enforcement of all laws—right or wrong, good or bad—issuing from a governmental system in place. The respect-worthiness of the governmental system in place supplies a requisite minor premise for the project. The major premise is fixed, but the minor premise is variable; that is, its truth depends on a judgment one makes regarding the respect-worthiness of the particular governmental system currently in place.⁴⁴

Then comes the question: How ought we conceive of the "governmental system in place," the claimed moral desirability of preserving which supplies a needed premise for general political justification? By what mental and discursive processes might we most

44. By speaking of the system as being "in place," I do not mean to suggest it must be conceived as closed to change. The system may be conceived to include devices for change, or avenues to change, and these may be among its most normatively significant features. All that is signified by "in place" is that anyone trying to gauge the moral adequacy of the system to render legitimate the governmental acts that issue from it will have to be able to say what the system is. If his account of it is going to include its built-in devices for change, or avenues to change, he will have to be able to say what they are. If they are plastic, uncertain, or in flux—as we well may have reason to wish them to be—he still will have to be able to say something, at least, about what the devices/avenues for resolving them are. And so on. See Frank I. Michelman, *Human Rights and the Limits of Constitutional Theory*, 13 *Ratio Juris* 63 (2000); Frank I. Michelman, "Protecting the People from Themselves," or *How Direct Can Democracy Be?*, 45 *UCLA L. Rev.* 1717, 1728-30, 1733-34 (1998).

aply construct our images of what "the system" is in order to gauge its respect-worthiness as a system?

Jeremy Waldron presents possibilities for what we may call—comparing it with John Rawls' proposal⁴⁵—a radically proceduralized theory of "the governmental system in place."⁴⁶ Perhaps it is possible for political associates at any time to agree on whether lawmaking and related public-policy choices are or are not being accomplished by means that are consistent with the principle of majority rule, including being open to revision by majoritarian means.⁴⁷ The chances for convergence among the reasonable on such a judgment may, at any rate, seem substantially better than the chances that a typical, liberal bill of constitutional rights, as actually construed and applied, can confidently be pronounced acceptable to everyone who is reasonable and rational.⁴⁸ Perhaps, also, the fact that a law was made in compliance with the requirements of a procedurally majoritarian constitutional system can itself suffice to render the law legitimate in the eyes of everyone who is reasonable in a political-liberal sense of that term.

My use of the term "legitimate," there, carries Waldron's explorations one step beyond where he, himself, has carried them so far.⁴⁹ Yet Waldron does, in effect, ask us to consider the possibility that my use of the term might be warranted. He wants us to consider that giving full sway to majority rule may yet prove an apt and practical way to combine a robust respect for difference, and for the normatively free and equal status of persons, with a like respect for the goods of the political⁵⁰ now expressly understood to encompass certain communitarian moral goods of social collaboration and collective action.⁵¹ The hypothesis would be that a firm commitment to majority rule—at least under certain, favorable conditions of political culture and "self-understanding"⁵² (compare "the reasonable")—can both give us the moral justification we need, as liberals, for collaboration in enforcement of the resulting laws,

45. See *supra* Part II.D.

46. See Waldron, *supra* note 34, at 282-312.

47. See *id.* at 300-01, 305-06. I have doubted it. See Michelman, "Protecting the People From Themselves," or *How Direct Can Democracy Be?*, *supra* note 44, at 1728-34. Waldron appreciates the difficulty. See Waldron, *supra* note 34, at 292-95, 298, 299-300.

48. See Waldron, *supra* note 34, at 294-95, 306-07; *infra* Part III.B.

49. See Waldron, *supra* note 34, at 299-300.

50. See *id.* at 295-96, 303-05.

51. See *id.*

[T]he demand that interests me . . . is a demand for a certain sort of recognition and . . . respect—that this, for the time being, is what the community has come up with and that it should not be ignored or disparaged simply because some of us propose, when we can, to repeal it.

Id. at 100 (emphasis omitted).

52. *Id.* at 308.

including wrong ones, and, at the same time, carry out the right sort of respect both for individuality and disagreement and for each other as political associates and co-operators.⁵³

This is a bold venture, and a surprising one coming from as staunch a defender of liberal rights ideas as Waldron.⁵⁴ Majority rule has run into famous objections (which Waldron looks squarely in the eye⁵⁵) as a solution to the problem of combining government by law with a devotion to both individual autonomy and respect for difference. The slogan "tyranny of the majority" is enough to bring these objections to mind. In the political-liberal perspective, the question is whether it could be thought reasonable to call on everyone, as reasonable but also as rational, to submit their fates to a majoritarian lawmaking system without also committing our society, from the start, to run itself in ways designed to constitute and sustain every person as a competent and respected contributor to political exchange and contestation and furthermore to social and economic life at large.⁵⁶ A negative answer is not *prima facie* implausible, and it would seem to be what drives a thinker like Rawls toward his more substantivized sort of proceduralism. Without trying finally to adjudicate the issue thus posed between Rawls and Waldron, we can say that a major question for Waldron is whether the majoritarian principle standing alone is too "thin" a base on which to rear a political-liberal legitimation project.⁵⁷

B. *The System as the Set of Constitutional Essentials*

It seems that the Rawlsian answer must face a converse challenge. Despite appearances and apparent intentions, the "liberal principle of legitimacy" may yield too thick a conception of the governmental system in place to support a political-liberal legitimation project.

Suppose a country has in place a "supreme law"-type of written constitution containing entrenched recitals of rights against the government. We might ask what, if anything, that fact about the country has to do with constructing the "governmental system in place," whose respect-worthiness might supply the major premise for a legitimation project. If we were constructing the system the way Ida does, as an interpreted governmental totality,⁵⁸ the answer would be "probably something but by no means everything." As we observed

53. See *id.* at 302-06.

54. See Jeremy Waldron, *Liberal Rights: Collected Papers, 1981-1991* (1993).

55. Waldron, *supra* note 34, at 298-302.

56. See Frank I. Michelman, *The Constitution, Social Rights, and Liberal Political Justification*, 1 Int'l J. Const. L. 13, 22-25 (2003). Waldron agrees. See, e.g., Waldron, *supra* note 34, at 284-85.

57. See Michelman, *The Problem of Constitutional Interpretive Disagreement*, *supra* note 20, at 113, 120.

58. See *supra* Parts I.B, I.C.

while presenting Ida's way,⁵⁹ that way involves no necessity to identify any separate and distinct body of law called "constitutional," and it makes no necessary demand for an entrenched, supreme-law sort of constitution containing substantive guarantees. If such a thing does happen in fact to be there, as a part of a given country's governmental totality, any Ida's appraisal of the respect-worthiness of that totality probably will take its presence into account.⁶⁰ It also will take into account any judicial rulings issued in its name that currently, as matter of fact, form a part of the country's governmental system. But if it happens that no such thing is there, the absence of it neither defeats appraisal nor points toward a negative appraisal. Historically, they have not had such a thing in the United Kingdom, and yet affirmative, legitimacy-sustaining judgments of their governmental totality have not thereby been rendered unimaginable. Yes, one can argue, as many recently have done with some degree of success in the U.K., that it would be on the whole helpful toward that end to introduce the device of entrenched, supreme, substantive constitutional rights. The point on which I insist is that one can easily conceive of a respect-worthy governmental system without ever having the idea of such a device enter one's head.⁶¹

That is, assuming we are doing it Ida's way. If we are doing it Rawls' way, the answer is very different. According to Rawls' liberal principle of legitimacy,⁶² the project can be carried off only if the regnant set of constitutional essentials is one that no reasonable person can reject as unworthy of the kind of respect that the legitimation project calls for, with the result that no reasonable person then can complain about the state's demand for everyone's support of all the laws that make it through the constitutional-legal screen.⁶³ So, for Rawls, a constitution there must be, in the sense of a distinctly and separately identifiable body of higher-law norms. That set of constitutional norms is what supplies the procedure to which inhabitants resort in order to get some resolution of their expected, obdurate divisions over the substance of major public policy choices. It turns out, though, that there are grounds for doubting whether, in a society where the fact of reasonable pluralism obtains in full force, any possible constitution could meet the test required by Rawls' political-liberal procedural principle—i.e., be non-rejectable by reasonable persons as unworthy of the kind of respect that the

59. See *supra* note 6 and accompanying text.

60. See Sanford Levinson, *Constitutional Faith* 180 (1988). Levinson refers to the Constitution as a "presence" that may or may not be deemed "encouraging" to "the establishment of a more perfect Union." *Id.*

61. See Waldron, *supra* note 34, at 287-88.

62. See *supra* text accompanying note 39.

63. At least, that will be true if some limited allowance is made for constrained events of civil disobedience and conscientious refusal. See *supra* note 29.

legitimation project calls for—and still do the work that the project calls for.

To describe the problem briefly:⁶⁴ A constitution's substantive guarantees are cast in abstract formulations, and not by accident, for it seems they would have to be thus cast in order (this is the proceduralist move) to prescind from morally divisive, major issues of public policy. It is not clear, however, that this method of avoidance can work. One can't, after all, judge a constitutional system in place respect-worthy (or not) without having in hand an adequate description of what the system is. Of course, there is a nominal or textual "Constitution" available for examination at any time. The question, though, is whether anyone can have in hand an adequate description of the actual constitutional system-in-place, until that ever-receding moment arrives when judges and other political actors finally will have finished the work of resolving reasonable uncertainties and debates about the textual constitution's bearing on questions the text may have had to refrain from answering, in order to achieve a plausible claim to non-rejectability, for legitimation purposes, by any reasonable political associate. Can I pronounce the system to have that character in virtue of the nominal constitution's "equality" clause, without knowing what the system does about affirmative action? Can I so pronounce it in virtue of the nominal constitution's "life" clause, without knowing what the system does about capital punishment? And so on. If not, then it seems that the respect-worthiness of any constitution, under an adequately complete description of it, will be subject to the same intractable, reasonable disagreements over major policy choices that the procedural move is meant to work around. The set of constitutional essentials, described with adequate completeness to support the legitimation project, bids fair to become too thick to secure the agreement—hypothetical, among the reasonable—that the project requires.

We don't have to decide right here on the ultimate force of this line of critique of Rawls' proposed, bill-of-rights centered version of a proceduralized, political-liberal justification of coercive, lawmaking power. (I, myself, remain uncertain about it). It is enough, for now, to feel the bite of the critique. That will set us up to ask whether Ida's way may not be more promising than either Waldron's (too thin?) or Rawls' (too thick?).

C. Ida's Way: The System as the Rationally Reconstructed Governmental Totality

If Ida's way does have some advantage over the other two, it is not because hers is any less "proceduralist" than the others are. Let us be clear about that. It is Ida's anticipation of deep, obdurate, reasonable

64. I go into it more fully in various papers cited in notes 20 & 44, *supra*.

disagreement at the major public policy level that drives her, as a consensus-seeking political liberal, to her felt need to produce an account (construction) of the governmental-system-in-place—which, by being respect-worthy (if it is), can justify support of a government demanding everyone's compliance with all of its laws. This constructed government-in-place plays a proceduralizing role in Ida's political-liberal thought analogous to that which the set of constitutional essentials plays in Rawls'.

Inevitably, reasonable disagreement is going to reach its tentacles into the system-constructions arrived at by sundry Idas all acting in the best of faith. We can see this by returning to our previous example.

We left our Lincolnesque, 1857 Ida at odds with the Garrisonians over which construction of the American Union (long-term slavery protective, or not) made, at the time, the closer, least-squares fit with all the relevant data. No doubt, one can imagine Ida's disagreement with the Garrisonians being strictly a matter of interpretation, not evaluation. That is, one can imagine the two sides agreeing perfectly on the weight of the general moral goods of union preservation and likewise on the lack of preservation-worthiness of a slavery-protective union, even as they nevertheless disagree over (and only over) how most accurately to interpret (rationally reconstruct) the specific, American Union in question. How certain can we be, though—how certain can the parties be—that the difference in their Union-constructions is not a direct reflection of a difference in the moral weights they respectively attach to the moral odiousness of slavery and the general values of system-preservation? Can their interpretive disagreement really be guaranteed independent of their respective, possibly divergent moral "priors?"

It seems there always will be room both for choice among plausible reconstructions of "the system" and for differing assessments of the respect-worthiness of the system according to whatever construction is chosen. It is hard not to suspect that the differing constructions are in some degree correlated to the differing assessments and that they both spring directly from differing moral priors regarding the directions and degrees of moral superiority and inferiority of particular reconstructions. Any individual social critic's mental and discursive processes of system-reconstruction undoubtedly are invaded by moral vectors, and the results arrived at by various critics undoubtedly are riven by divergence of some of the vectors arising in their several minds. A given critic's rationally reconstructed governmental totality thus seems no likelier than a completely described set of constitutional essentials (i.e., after the tenors of their applications to major, divisive public policy questions have been authoritatively resolved) to figure persuasively as an object of hypothetical consensus among the reasonable.

Nevertheless, Ida's way may hold a significant advantage over Rawls' way. Every Ida who accepts Hobbes' thesis and who attaches great moral importance to the general goods of union has strong, moral reasons to wish for a favorable judgment regarding the respect-worthiness of the system-in-place as she reconstructs it. All reasonable Idas, therefore, have reason to be tolerant of what they see as moral mishaps in the systemic history—specifically, by writing off those mishaps as “mistakes.” In short, the Idas all may tend to construe the system, insofar as the facts permit, in ways that to them are morally optimistic. Since their moral priors will differ, so will the systemic reconstructions they arrive at. And this is a political-moral advantage, not a disadvantage! The plurality of the reconstructions the Idas arrive at will be precisely geared to a convergence across their number of favorable judgments of respect-worthiness of their country's political “procedure”—which is exactly what political liberals are driving at.

Would it be going too far to suggest that we see here quite graphically what John Rawls had in mind in speaking of the possibility of an overlapping political-moral consensus among differing, comprehensive views of morality,⁶⁵ bearing in mind that the goods of union, or of the political—a perception of which is what all the Idas share, making the overlap possible—may well be regarded as moral goods?⁶⁶

It seems—strikingly—that the same hope for an overlapping consensus cannot be held out, in the same way, for Rawls' own, constitution-focused liberal principle of legitimacy. That is because Rawls' proposed principle contains an indissoluble kernel of legalism and contractualism. That set of “constitutional essentials” upon which Rawls hypothesizes a possible universal agreement among the reasonable is a law. It may not be simply a law, or nothing but a law, but it figures for Rawls as a law however else it also may figure. As a law, it must have the same applied meaning for everyone. It cannot mean simultaneously “yes” and “no” to affirmative action. At any given moment of controversy, it must be held by some Hercules to mean the one or other, one and the same meaning for you and for me. In Rawls' principle, in other words, the constitutional essentials serve as a kind of a political contract—the adequately described terms of which, one fears, will be either too thick or too thin to carry the weight of a political-liberal legitimation project.⁶⁷

No such fear need attach to the governmental totalities the Idas variously construct. A governmental totality is not a contract that binds anyone; it is just a picture of an empirically existent social

65. See John Rawls, *The Idea of an Overlapping Consensus*, in Rawls: Collected Papers 421 (Samuel Freeman ed., 1999); Rawls, *supra* note 1, at 133-72.

66. See *supra* Part II.B.

67. See Michelman, *Living With Judicial Supremacy*, *supra* note 20.

practice. Although that existent practice-totality is composed, in part, of laws meant to be binding, no Ida's reconstruction of it has the binding force of a law. (Ida, to repeat, is not a legal official.⁶⁸) The existent practice we call the governmental totality is real, no doubt, and so it is, on some level of possible description, the same for all participants. But there is no reason why every single participant cannot or should not perceive it differently and describe it differently and thereby accommodate the pull each reasonable participant will feel, for good reason, toward finding it respect-worthy.⁶⁹ Chartres can be reported beautiful unanimously, by numerous, competent critics, all regarding it partially from their several, differing angles of view. And the case also quite possibly could be that Chartres truly is beautiful, although no one ever will see it "whole."

68. See *supra* Part I.C, concluding paragraph.

69. See *supra* Parts I.A, II.C.

Notes & Observations